

**THE YALE JOURNAL
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Abstracts

Articles

- Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts *Alexandra Huneus* 1

The most recent twist in the story of structural reform litigation is international. To their traditional role of declaring violations and ordering remedies for victims, the European and the Inter-American Courts of Human Rights have added a more ambitious project: the implementation of structural changes at the national level. And, like the U.S. Supreme Court in the school desegregation and prison reform cases, they have begun to encounter their own institutional and political limits. This Article is the first to view the courts' recent forays into structural reform litigation through a comparative lens. Using Abram Chayes' classic study of public law litigation in the United States as a springboard, it reveals the reasons for the emergence of structural reform litigation at the transnational level, and the unique strategies the courts use to maintain legitimacy despite stretching their mandates.

- "Reasonable Doubt" in Islamic Law *Intisar A. Rabb* 41

Against a popular notion of Islamic law as a limited set of texts of divine origin that bar judicial discretion and require harsh punishment, this Article argues that Muslim jurists historically generated a doctrine of "reasonable doubt" in response to changing social and political contexts. In a move astonishing for its boldness and its virtual invisibility, those jurists transformed the doubt doctrine from reports of early judicial practices into a foundational legal text. That is, jurists writing at the end of the long founding period of Islamic law (seventh to eleventh centuries) successfully claimed that the Prophet Muhammad himself had announced a "doubt canon" in the seventh century—directing judges to avoid criminal punishments in cases of doubt. The transformation was so complete and the claim so effective that few later jurists were aware of the dubious prophetic pedigree for the Islamic doctrine of doubt. Remarkably, medieval Muslim jurists deployed concepts of doubt to assert interpretive power over Islamic law, to define institutional relationships, and either to curb executive overreach in or to assert parameters for legitimate punishment. In effect, they used ever-expanding definitions of doubt to construct the very elements and institutions of legitimate crime and punishment that they sought to regulate.

This surprising turn of events is like a modern-day U.S. constitutional amendment that passes without going through any legislation or ratification process, and where history forgets that the textual modification was not a part of the original document. The forgotten history of doubt in Islamic law is crucial to understanding the most pressing questions surrounding the reemergence of Islamic law as state law in modern constitutional and criminal contexts. As an originalist legal tradition, Islamic law today heavily relies on the past for definitions of Islamic constitutional and criminal law, often in ways that are unaware of the prominent role of discretion and doubt in Islam's founding period and beyond. This Article explores the history of doubt.

Rethinking the Temporary Breach Puzzle: A
Window on the Future of International Trade
Conflicts

Mark Wu 95

The World Trade Organization (WTO) is held out as an exemplar of an effectively functioning international "court." Yet, a puzzle remains unexplained: in WTO litigation, a respondent found to have enacted an illegal trade policy measure needs only to remedy the illegality. So long as it does, the WTO lacks the authority to order retrospective remedies to be paid to the complainant for past harm. The remedies loophole provides countries with a "free pass" for temporary breach. Why do more countries not take advantage of this pass more frequently? How is it that the WTO manages to function effectively in spite of its imperfect remedies?

This Article suggests that the key to understanding the answer to this puzzle lies in the importance of power asymmetries in a WTO system that is dynamic and evolving. It identifies a series of policy instruments available to a powerful country whenever its trading partner is tempted to undertake a temporary breach that harms the powerful state's interests. These instruments create additional costs that offset the benefit of any temporary breach, thereby effectively deterring most, albeit not all, temporary breaches. In addition, the established powers share a collective interest in maintaining the WTO system's stability. This also causes them to exercise collective self-restraint in their own exercise of temporary breaches.

The answer to this puzzle is of more than just academic importance. It also sheds important light on the future of the international trade regime. As geopolitical power shifts and trade among developing countries increases, particular countries may find it more tempting to engage in temporary breaches under certain circumstances. This Article examines the nature of these emergent conflicts and discusses its implications for the future of the global trading regime.

Note

Is Successful Water Privatization a Pipe Dream?:
An Analysis of Three Global Case Studies

Tanya Kapoor 157

For decades, governments across the world have struggled to privatize their water systems. In the developing world, water privatizations have often led to bitter populist clashes, public health crises, and cancelled concession agreements. This Note studies three water privatizations and analyzes why certain privatizations fail and others succeed. By analyzing privatizations through three factors—class dynamics, deal structure, and political climate—this Note suggests ways in which developing governments can structure water privatizations to deliver long-term improvements to local communities. This Note argues that successful water privatizations often dilute class dynamics by instituting progressive pricing schemes, promote business transparency by requiring stringent due diligence, and advance citizens' interests by employing strict regulatory oversight. By replicating these features, developing governments are more likely to negotiate successful water privatization deals on behalf of their citizens.

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